IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF.

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
Attorneys for Appellant,
39 South La Salle Street,
Chicago 3, Illinois.

ADAMS NELSON & WILLIAMSON,
Of Counsel,
39 South La Salle Street,
Chicago 3, Illinois.

March 31, 1947.

INDEX.

	PAGE
Jurisdiction on Appeal	1
Statement of the Case	6
Specification of Assigned Errors Intended to be Urged	13
Summary of Argument	14
Argument:	
I. The Brotherhood is an Indispensable Party	17
II. Federal Statutes Give the Brotherhood an Unconditional Right to Intervene Within the Meaning of Rules of Civil Procedure (24(a)(1)).	
A. The Interstate Commerce Act Confers the Right of Intervention on the Brotherhood	22
B. The Judicial Code Confers the Right of Intervention on the Brotherhood	24
III. The Brotherhood is Entitled to Intervention of Right Under Rules of Civil Procedure 24(a)(2)	27
Conclusion	37

Table of Authorities.

Cases.

Alston Coal Co. v. Federal Power Commission, 137 F. (2d) 740 (10th Cir. 1943) 2

Baltimore & Ohio R. Co. v. Chicago Junction Ry. Co., 156 F. (2d) 357 11

Boston Tow Boat Co. v. U. S., 321 U. S. 632 25

Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad Co., 321 U. S. 50 30

Chicago, Milwaukee & St. Paul Railroad v. Adams County, 72 F. (2d) 816 (9th Cir. 1934) 18

Gulf, Mobile & Northern Railroad Company v. Illinois Central Railroad Company, 21 F. Supp. 282 (D. C. Tenn. 1937, appeal dismissed by stipulation in 109 F. (2d) 1016) 31-35

International Brotherhood v. Keystone Freight Lines, 123 F. (2d) 326 (10th Cir. 1941) 21

Kansas City Southern Ry. Co. v. U. S., 282 U. S. 760 25

Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc., 126 F. (2d) 931 (10th Cir. 1942) Certiorari denied 317 U. S. 645 29-30

Mallow v. Hinde, 25 U. S. 116 18

Minnesota v. Northern Securities Company, 184 U. S. 199 20

Missouri Kansas Pipe Line Co. v. United States, 312 U. S. 502 2

Moffat Tunnel League, v. U. S., 289 U. S. 113 25

Niles-Bement-Pond Company v. Iron Moulders Union, 254 U. S. 77 18

Shields v. Barrow, 17 How. 130 18

Southeastern Motor Lines, Inc. v. Hoover Truck Co., Inc., et al., 34 F. Supp. 390 (D. C. Tenn. 1940) 30-31

United States v. Fisher, 2 Cranch 358 23

United States v. United Mineworkers of America, (L. ed. Advance Opinions, 91 L. ed. 595) 17

Washington v. United States, 87 F. (2d) 421 (9th Cir. 1936) 2, 18

Statutes.

Interstate Commerce Act:

Section 5 (2)(f) (49 USCA Chap. 1, Sec. 5 (2) (f)) 26

Section 16 (12) (49 USCA Chap. 1, Sec. 16 (12)) .23, 24

Section 17 (11) (49 USCA Chap. 1, Sec. 17 (11)) 11, 13, 15, 22, 23, 24

Judicial Code:

Section 210 (28 USCA Sec. 47a) 3

Sections 212, 213 (28 USCA Sec. 45a) 12, 13, 15, 24, 25, 26

Section 238 (28 USCA Sec. 345) 2

Norris-LaGuardia Act (29 USCA Sec. 101-115) 12, 16, 28, 30, 31

U. S. Code Annotated, Title 28, Section 44 ..... 3, 24, 25, 26

Rules.

Rules of Civil Procedure for District Courts of the United States:

Rule 19 18

Rule 24 (a) (1) 4, 13, 15, 22

Rule 24 (a) (2) 4, 11, 13, 15, 27, 37

Rule 65 (e) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF.

JURISDICTION ON APPEAL.

Jurisdiction of the Supreme Court to entertain this appeal from the District Court order of November 7, 1946, denying intervention to appellant is based primarily on these two premises:

1. The order appealed from was entered in a suit

brought to enforce an order of the Interstate Commerce Commission, other than for the payment of money.

2. When interventon in such a suit is applied for as a matter of right, an order denying such intervention is final, and is appealable directly to the Supreme Court.

There appears to be no basis for dispute as to either of these primary jurisdictional elements. This is a suit for a mandatory injunction wherein plaintiffs assert violation of an order of the Interstate Commerce Commission relating to traffic and operating relationships (R. 3). Final orders entered by district courts in such cases are directly appealable to the Supreme Court under the statutory provisions hereinafter quoted. Where intervention is asserted as a matter of right, it is well settled that an order denying such intervention is final, and is thus appealable.

Missouri Kansas Pipe Line Company v. *United States,* 312 U. S. 502.

Alston Coal Company v. *Federal Power Commission,* 137 F. (2d) 740 (10th Cir. 1943).

Washington v. *United States,* 87 F. (2d) 421 (9th Cir. 1936).

Pertinent portions of the applicable statutes are as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

• • •

"(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money." (Judicial Code Sec. 238, 28 U. S. C. A. Sec. 345)

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases * * * Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court." (Judicial Code, Sec. 210, 28 U. S. C. A. Sec. 47a)

"The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title . . . ." (28 U. S. C. A. Sec. 44)

We think it follows from the above that since this is a suit brought to enforce an order of the Interstate Commerce Commission other than for the payment of money, and intervention therein was asserted by appellant as of right and was denied, jurisdiction on appeal is clearly conferred on the Supreme Court by the statutory provisions above quoted.

However, certain appellees have moved to dismiss the appeal for lack of jurisdiction. The only ground for this motion is that the order appealed from is not a final, appealable order, and this ground is in turn *based solely on appellees' contention that appellant is not entitled to intervene as a matter of right in the district court.*

The sole question raised by a motion on this ground necessarily involves the merits of the appeal, since the only purpose of the appeal is to establish the exact opposite

of what the motion asserts. The only way this Court can pass on the ground stated in the motion to dismiss is to decide whether appellant should have been allowed to intervene as a matter of right, and that plainly constitutes a review of the order which decided the same point below. Therefore, if this Court decides that appellant should have been allowed to intervene as a matter of right, then the above stated basis for the motion to dismiss no longer exists, and this Court's jurisdiction to order a reversal is unchallenged. Moreover, when it is considered that the appellees have submitted to this Court a motion which is actually based on the correctness of the order appealed from, they have thereby admitted the power of this Court to review that order.

But the problem is the same whether it is approached from the standpoint of deciding the preliminary question of jurisdiction raised on the motion to dismiss, or the ultimate question of reversal or affirmance on the merits. If this Court decides that appellant should not have been allowed to intervene as a matter of right, then the trial court's order denying intervention will stand, and it makes little or no practical difference whether the form of the Supreme Court's order affirms the district court order or dismisses the appeal. The ultimate question involved on the merits of the appeal will have been passed on in either event.

We believe that when the application for intervention shows that it is made under Rule 24(a) of the Rules of Civil Procedure entitled, "Intervention of Right", that fact in itself should be enough to establish jurisdiction on appeal to review an order denying the application. Otherwise, in every such case the reviewing court is put in the anomalous position of holding that an order denying intervention of right is not appealable unless that order

is wrong, and it is only after the reviewing court has so determined that it acquires the jurisdiction to entertain the appeal. We submit that the Court is not required to back into the case in this manner, and that jurisdiction on appeal is shown, under the above statutes, from the very fact that the intervention was applied for as a matter of right and was denied. The points on which appellant relies for reversal will therefore be treated below under the heading Argument.

STATEMENT OF CASE.

The original plaintiffs are eight of the so-called "trunk-line" railroads which operate east and southeast from Chicago (R. 1-2). The Interstate Commerce Commission (herein called the Commission) was granted leave to intervene as an additional plaintiff (R. 47).

The defendant Chicago River and Indiana Railroad Company (herein called the River Road) operates a small but important switching railroad in the Chicago area (R. 56). Its holdings include all the tracks connecting the various trunk lines, including plaintiffs', with the Union Stock Yards at Chicago (R. 12-16). The defendant Chicago Junction Railway Company is the non-operating lessor of some of the River Road tracks (R. 51, 57). The defendant New York Central Railroad Company owns all of the capital stock of the River Road (R. 53). River Road employees are sometimes referred to in documents herein as "C. J. Crews" (R. 88).

The appellant, Brotherhood of Railroad Trainmen, an unincorporated association (herein called the Brotherhood), is the collective bargaining representative of railroad trainmen employed by the River Road (R. 55-56). The denial by the district court of its motion to intervene as a party defendant (R. 137) is the subject of this appeal (R. 148).

The essential dispute in the case is whether certain stock car movements on River Road tracks shall be handled by River Road power and crews or by the plaintiff carriers' power and crews (R. 10-11).

The disputed operations pertain to the switching and

spotting of stock cars incident to outbound shipments of livestock from the Chicago Stock Yards to various points outside Illinois (R. 54-55). Empty stock cars for these shipments are switched in from the trunk lines over River Road tracks, spotted at the loading chutes, and when loaded they are moved back over River Road tracks and switched to the trunk lines.

The River Road trainmen contend that under their contract with the River Road, they are entitled to do the yard work involved in both of these operations on River Road tracks, that is:

1. To switch and spot the empty cars for loading live-stock from points of interchange with the trunk lines on the River Road tracks to the loading chutes for loading.
2. After such cars have been loaded, to switch them from the loading chutes to the interchange points on the River Road tracks where they are to be picked up by the trunk lines (R. 90-92).

The River Road trainmen base their claim to this work, first, on their original collective bargaining agreement signed December 20, 1919, (R. 118) providing that they shall handle all "yard work" on their employer's line (R. 108-109) and second, on a "settlement interpretation" of this agreement dated January 23, 1946, specifically providing that they shall handle the switching and spotting of all outbound stock car movements (R. 88).

The "settlement interpretation" was made effective February 1, 1946, and thereafter all such movements, whether of hogs, sheep or cattle, were handled by the River Road power and crews (R. 55). Immediately prior to this time the River Road trainmen had been handling these movements as to hogs and sheep, but were not handling them as to beef cattle (R. 90-91). When the River Road power and crews took over this work as to all live stock,

the charges made by the River Road were collected from the various trunk lines at a previously established rate of $12.96 per outbound car as a division of the joint through rate (R. 54-55).

The plaintiff railroads brought this suit on February 12th, 1946 (R. 1). They complain of the above arrangement effected by the River Road pursuant to the settlement made with the Brotherhood. Plaintiff carriers contend that the above outbound movements (except in the case of hogs and sheep) should be carried out exclusively by them with their own power and crews over the tracks of the River Road, and that they should be allowed to use the River Road tracks for this purpose at the rate of $2.00 per car, that is, $1.00 for the empty and $1.00 for the loaded movement (R. 6-11).

Plaintiff carriers allege (R. 3) that the practice of allowing them to use River Road tracks with their own power and crews had been in effect on May 16, 1922, on which date a report and order was made by the Commission requiring continuance of the then existing "traffic and operating relationships" between the River Road and other carriers, and thus that the change effected on February 1 was in violation of this Commission order (R. 8).

The Commission order relied on by plaintiffs was entered in a proceeding had on the application of the New York Central, submitted in 1922, for approval of its plan to purchase all the stock of the River Road and for approval of a 99-year lease of Chicago Junction tracks to the River Road (R. 12). The above quoted phrase regarding "traffic and operating relationships" appears as a condition in the Commission report on which its order approving this purchase and lease is based. This condition reads as follows (R. 22):

> "3. The present traffic and operating relationships existing between the Junction and River Road and

all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central."

The report and order of the Commission do not specifically state whether the switching and spotting incident to outbound shipments of livestock were then handled by the trunk line power and crews, or by River Road or Chicago Junction power and crews. However, the report does state that each carrier "goes into the pens for outbound stock destined for its own line". The portion of the report which includes this phrase is as follows (R. 15):

> "The movement of live stock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic."

The above is the only part of the report bearing on the subject of outbound stock car movements. If a difference then existed in the "only practical method" of handling outbound movements of cattle, as against those involving hogs and sheep, the report made no mention of it.

Relying on the above order and report, plaintiff carriers seek a mandatory injunction against the River Road, the Chicago Junction, the New York Central, and all the employees of each of them, commanding them to permit plaintiff carriers to carry out the above described movements on River Road tracks, using plaintiffs' own power and crews. Plaintiff carriers also ask for a preliminary injunction, and damages for the alleged wrongful acts of the River Road (R. 10-11).

Neither the Brotherhood nor any of the employees it represents was named as a defendant, and no notice was

served on any of the employees referred to in plaintiffs' application for the preliminary injunction (R. 92).

On February 21, 1946 the Commission was granted leave to intervene as a party plaintiff (R. 47). Its intervening complaint also prayed for an injunction against alleged violation by defendant carriers and their employees of the Commission order of May 16, 1922 (R. 49).

On February 25, 1946 a stipulation of facts was filed (R. 50). It included a description of the above change in the method of handling outbound shipments of live stock other than hogs and sheep which took place on February 1, 1946. The stipulation also made mention of the fact that this change was effected as a result of a settlement between the River Road and the Brotherhood of a labor dispute over the work involved in these stock car movements (R. 55-56).

On March 14, 1946 the district court issued a preliminary injunction as prayed for by plaintiff carriers, commanding defendants and their employees to permit plaintiff carriers, with their own power and crews, to use the River Road tracks for outbound shipments of live stock other than hogs and sheep (R. 58-67). This injunction became effective March 15, 1946 (R. 67). The injunction order concluded as a matter of law that the labor dispute between the River Road and the Brotherhood, as described in the stipulation, was "irrelevant and immaterial" (Para. 10, R. 65).

On March 18, 1946, three days after the preliminary injunction became effective, the Brotherhood asked leave to file its special appearance for the purpose of moving to vacate the preliminary injunction and to dismiss the proceedings for failure to join indispensable parties (R. 67-72). This motion was denied on the next day, and the preliminary injunction was continued in effect.

On March 26, 1946 the Chicago Junction appealed from the order granting the preliminary injunction against it, and this order was reversed as to the Chicago Junction by the Circuit Court of Appeals, 7th Circuit, in *Baltimore & Ohio R. Co.* v. *Chicago Junction Ry. Co.*, 156 F. (2d) 357.

On May 6, 1946, the answer of the River Road was filed (R. 81-90). It stated that the handling of the movements in question was the subject of a dispute existing between it and the Brotherhood prior to January, 1946, the Brotherhood having contended that under their original employment contract, River Road employees were entitled to the work connected with the switching and spotting of all stock cars incidental to outbound movements of live stock over River Road tracks. The answer also states that until January 23, 1946 the River Road had resisted the demands of the Brotherhood for settlement of this grievance, but on that date, in order to avert a strike, it made an agreement with the Brotherhood, effective February 1, 1946, under which the Brotherhood members would do this work. The answer denies that this arrangement is violative of the Commission order of May 16, 1922 (R. 84).

On May 20, 1946 the Brotherhood filed its motion to intervene generally as a party defendant (R. 90-98). The Brotherhood's motion alleged that the primary purpose of the suit was to nullify the settlement interpretation of January 23, 1946, and to deprive the Brotherhood members of work they were performing thereunder, and that the Brotherhood members were therefore the real parties in interest as defendants, and as such, indispensable parties. The motion contended that the right to intervene is unconditionally conferred upon the Brotherhood by statute (49 USCA Sec. 17(11)). The motion also asserted intervention of right under Rules of Civil Procedure 24(a)(2), and set forth various reasons it was contended that the

interests of the Brotherhood in the suit were inadequately represented by the River Road, included among which was the failure of the River Road to assert the applicability of the Norris-LaGuardia Act as a defense to the action (R. 94-97). Attached to its motion to intervene was the Brotherhood's motion to vacate the preliminary injunction, to assess damages against plaintiffs and for summary judgment, this being the document the Brotherhood proposed to file if its motion to intervene were granted (R. 99-126). The motion to intervene was denied by order dated November 7, 1946 (R. 137).

On November 26, 1946 the Brotherhood asked leave to amend its motion to intervene (R. 138-140). The proposed amendment included an additional statute which the Brotherhood contended conferred upon the Brotherhood an unconditional right to intervene (28 USCA Sec. 45a). At the same time the Brotherhood also moved to vacate the order denying intervention. Both of these motions were denied on the same day (R. 138).

On January 6, 1947 the Brotherhood filed its petition in the district court to appeal from the order of November 7, 1946 denying intervention (R. 146), and the appeal was allowed by the district court on January 6, 1947 (R. 148).

On January 23, 1947 the plaintiff railroads moved to dismiss the appeal on the ground that this Court has no jurisdiction to entertain it, or in the alternative, that the order appealed from be affirmed. The ground stated in support of the motion to dismiss is that the order appealed from is not a final order and thus is not appealable because appellant was not entitled to intervene as a matter of right. The motion to affirm asserts lack of any substantial question involved on the appeal.

On March 3, 1947 this Court postponed further consideration of the question of jurisdiction to the hearing of this appeal on its merits (R. 163).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

The assigned errors (R. 147-148) which the Brotherhood intends to urge are as follows:

1. The district court erred in denying intervention of right to the Brotherhood in that this suit seeks to enjoin Brotherhood members from working under a collective bargaining agreement made by the Brotherhood with their employer, wherefore the Brotherhood is an indispensable party to this suit, and has an absolute right to intervene.

2. The district court erred in denying intervention of right to the Brotherhood in that federal statutes, within the meaning of Rules of Civil Procedure 24(a)(1), confer an unconditional right to intervene on the Brotherhood, to-wit: the Interstate Commerce Act, Sec. 17(11) (49 USCA Sec. 17(11)) and the Judicial Code, Sections 212, 213 (28 USCA Sec. 45a).

3. The district court erred in denying intervention of right to the Brotherhood in that representation of the Brotherhood's interest by existing parties is or may be inadequate and the Brotherhood is or may be bound by a judgment in this action within the meaning of Rules of Civil Procedure 24(a)(2) providing for intervention of right.

SUMMARY OF ARGUMENT.

The district court erred in denying the Brotherhood's motion to intervene as a matter of right. Intervention should have been allowed on any one or more of the following grounds:

I. The Brotherhood Is An Indispensable Party.

This suit seeks to enforce plaintiff carriers' asserted right to use their own power and crews in switching and spotting outbound stock cars on River Road tracks. When this suit was brought, these movements were being handled by River Road power and crews under a contract between the River Road and the Brotherhood made after extended negotiations in which the Brotherhood prevailed in its insistence that this work be awarded to its members. This suit seeks to establish that performance by the River Road and the Brotherhood members of this part of their employment contract should be enjoined as violative of a Commission order. The relief prayed for cannot be granted without an adjudication of the rights of the Brotherhood members under their employment contract. The Brotherhood members are therefore the real parties in interest as defendants; they are indispensable parties, and the Brotherhood, as their representative, has an absolute right to intervene.

II. Federal Statutes Give the Brotherhood an Unconditional Right to Intervene Within the Meaning of Rules of Civil Procedure 24 (a) (1).

(A) The Interstate Commerce Act, under which this suit was brought, provides that the duly designated representatives of employees of a carrier "may intervene and be heard" in any proceeding under the Act "affecting such employees" (49 USCA Sec. 17 (11)). The Brotherhood is admittedly the qualified representative of River Road employees, and since direct injunctive relief is sought against River Road employees, there is no question but that this is a proceeding which affects such employees. This statute therefore confers an unconditional right of intervention of the Brotherhood.

(B) The Judicial Code provides that associations "interested" in a suit relating to action of the Interstate Commerce Commission "may intervene in said suit . . . at any time after the institution thereof" (28 USCA Sec. 45a). This suit relates to action of the Interstate Commerce Commission, and the Brotherhood is an association which is unquestionably "interested" in the suit within the meaning of this statutory provision. The Brotherhood is therefore entitled to intervene as a matter of right under this statute.

III. The Brotherhood Is Entitled to Intervention of Right Under Rules of Civil Procedure 24(a) (2).

This rule guarantees intervention of right to an applicant who "is or may be bound by a judgment in the action", and whose interest "is or may be" inadequately represented by existing parties. The Brotherhood members, as employees of the River Road, are expressly bound in this suit by the preliminary injunction already issued, and will be similarly bound if the injunction is made per-

manent. The River Road, which is the only existing party which might have undertaken to represent the Brotherhood's interest, has avowed that it feels no such duty, and that it may have interests adverse to the Brotherhood. The River Road considers its contract with the Brotherhood to be onerous, and the River Road is therefore not the proper party to champion the defense of that contract. Inadequacies in the defense provided by the River Road include its failure, in view of the labor dispute involved, to urge the applicability of the Norris-LaGuardia Act so as to prevent the issuance of an injunction and to require dismissal of the suit.

ARGUMENT.

I. The Brotherhood Is An Indispensable Party.

The absence of the Brotherhood or its members as indispensable parties was invited to the district court's attention before the preliminary injunction was issued. The court evidently felt that it would be proper to issue the injunction against the Brotherhood members first, and decide later at the hearing on the permanent injunction whether they were indispensable parties (R. 77). This was done on the theory that if the Brotherhood or its members later proved to be indispensable parties, the injunction would be a nullity as to them and they would then know that they could have ignored it with impunity from the beginning (R. 74). If, during the pendency of the decision on indispensability, the Brotherhood members obeyed the injunction through groundless fear of its validity and consequent binding effect upon them, they would have only themselves to blame for giving such undue respect to the court's order. They were reassured in this regard by the trial judge as follows:

> "If you are indispensable parties any order the court might make would be void in any event. You don't need to give the matter a second thought" (R. 134).

Compare *United States* v. *United Mineworkers of America*, (L. ed. Advance Opinions, 91 L. ed. 595).

The familiar general rules as to whether the interest of an absent person is such as to make him an indispensable party may be summarized as follows:

1. He is an indispensable party if the suit involves a direct adjudication upon his rights.

2. He is an indispensable party if his interest is not distinct and severable from that of the named parties.

3. He is an indispensable party if, in his absence, the court cannot render justice between the parties before it.

4. He is an indispensable party if the final decree will have an injurious effect upon his interest.

5. He is an indispensable party if a final decree, even though it does not affect his interest, will leave the controversy in such condition that its final determination is wholly inconsistent with equity and good conscience.

Rule 19, Rules of Civil Procedure.

Mallow v. *Hinde*, 25 U. S. 116.

Shields v. *Barrow*, 17 How. 130.

Niles-Bement-Pond Company v. *Iron Moulders Union*, 254 U. S. 77.

Washington v. *United States*, 87 F. (2d) 421 (9th Cir. 1936).

Chicago, Milwaukee & St. Paul Railroad v. *Adams County*, 72 F. (2d) 816 (9th Cir. 1934).

The facts bearing on indispensability of the Brotherhood as a party, all of them readily available to the district court at the outset, may be re-stated briefly as follows:

A labor dispute of long standing between the Brotherhood and the River Road over the handling of outbound stock car movements on River Road tracks was settled through collective bargaining on January 23, 1946. The settlement was in the Brotherhood's favor in that its demand for the right to do this work was recognized, effective February 1, 1946 (R. 86). The settlement meant that other carriers, while they were using River Road tracks for outbound stock cars, would be required to allow River Road power and crews to switch and spot such cars begin-

ning February 1, 1946. This suit followed twelve days later. Plaintiffs challenged the legality of the car handling provided under the settlement on the ground that it was violative of a Commission order requiring continuance of traffic and operating relationships as they existed in 1922 between plaintiffs and the River Road. Plaintiffs asked the court to use its injunctive power to take this work away from the River Road employees. The River Road was named as a defendant, but not the Brotherhood or any of its members.

This was the situation presented to the district court on the application for a preliminary injunction. We think it might have occurred to the court, on its own initiative, that the real parties in interest, *i.e.*, the principal parties who would be adversely affected by the proposed injunction, were not in court. This was evidenced at the very beginning from the fact that the principal named defendant, the River Road, was pointing to the labor dispute between it and its employees and the danger of a strike in connection therewith to explain its part in the acts complained of, and yet was not opposing the injunction on the obvious ground that the requirements of the Norris-LaGuardia Act had not been met by plaintiffs. This should have made it reasonably clear that the River Road, as a reluctant party to a collective bargaining agreement with its employees, would not consider itself adversely affected by an injunction relieving it from performance of the agreement, so long as the employees in favor of whom the agreement was made were also enjoined.

We think the court might easily have perceived, from this situation, that the proceeding should be dismissed on the court's own motion unless the employees sought to be enjoined were named as parties defendant. Authority for

this action is clearly stated in *Minnesota* v. *Northern Securities Company*, 184 U. S. 199 (at page 235):

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by counsel."

No extensive discussion of the authorities is necessary to demonstrate that the Brotherhood is an indispensable party. It is manifest that the Brotherhood members have a property right of their own in the work awarded to them under their employment contract. Acts done in performance of that contract obviously prompted this suit, brought to enjoin performance both by employer and employee. It would be pure sophistry to say that the interests of the employer and the employees under this contract are identical or so nearly alike that the employees cannot be recognized as a separate legal entity. To say that employees of a corporate employer are like its officers, agents and representatives, and can be recognized only as appendages of the corporate body with no separate existence of their own is not only unrealistic; it is contrary to the basic legal concept of present day employer-employee relationships. Collective bargaining agreements are bilateral contracts both in form and substance, and the fact that they shall be made with employer and employee at arm's length is a fundamental principle of present labor laws. The provisions of the Interstate Commerce Act which specifically recognize employees as having justiciable rights of their own regarding their employment apart from their employer will be discussed in the next section of this brief.

It has been explicitly held that when an injunction is

sought against a carrier employer and its employees regarding the handling of freight, the naming of employees as persons sought to be enjoined gives the labor union representing such employees an absolute right to intervene, and that in some instances the labor union may actually be the real party in interest. *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326 (10th Cir. 1941).

We submit that no matter what test of indispensability is applied, the fact that direct injunctive relief is sought against the River Road employees is of itself sufficient proof that the interest of the Brotherhood, as their representative, is such that the Brotherhood is an indispensable party. When we add to this the fact that the relief sought would inevitably nullify provisions in a contract on which certain employment of Brotherhood members specifically depends, and would condemn the work done by them thereunder as illegal, it would be impossible to devise a test of indispensability which could exclude them without violating the constitutional guarantee of due process.

In this case the district court took upon itself the grave responsibility of using its injunctive power to order men off their work in a proceeding to which they were not parties, without serving notice on them or giving them an opportunity to be heard, and without determining whether these men were indispensable parties to the proceeding. If this was not in itself an abuse of judicial power, then surely, after the order was entered, the minimum duty which devolved upon the district court was to permit the absent parties affected to enter the suit so that they might protest against the injunction. The injunction against these men has now been in effect for more than a year, and they have yet to be given their day in court to defend their right to work.

II. Federal Statutes Give the Brotherhood an Unconditional Right to Intervene Within the Meaning of Rules of Civil Procedure 24 (a) (1).

Quite apart from the status of the Brotherhood as an indispensable party seeking intervention, its right to intervene is unconditionally provided by two federal statutes. Rule 24 (a) (1) of the Rules of Civil Procedure specifically directs allowance of a timely application to intervene when intervention is provided by federal statute. The rule is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; . . . ."

A. *The Interstate Commerce Act Confers the Right of Intervention on the Brotherhood.*

The first statutory provision requiring allowance of the Brotherhood's motion to intervene is in the Interstate Commerce Act itself, the Act under which the complaint alleges this suit was brought. Section 17 (11) of the Act (49 USCA Chap. 1, Sec. 17 (11)) provides as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

We note at the outset that this provision distinctly recognizes that employees of a carrier may have interests of their own as such employees which are entitled to a representation that is separate and apart from their employer. An applicant's absolute right to intervene is plainly established under this provision when it shows (1) that it is the duly designated representative of carrier employees, (2) that the proceeding affects such employees, and (3) that the proceeding arises under the Interstate Commerce Act.

That the Brotherhood is the duly designated representative of trainmen employees of the River Road was not disputed. That this suit affects such employees, although not granted in so many words by plaintiffs, was in effect conceded by them when their counsel said (R. 133):

> "If you do not enjoin the individuals the order miscarries * * *."

The only other question raised in the district court under this statutory provision was whether the above phrase "any proceeding arising under this chapter" applies to the instant suit, brought under Section 16 of Chapter 1, in view of the heading of Section 17 of Chapter 1 (49 USCA Sec. 17):

> "Commission procedure; Delegation of Duties, Rehearings * * *"

It was contended by plaintiffs (R. 132) that this means intervention is provided only in Commission proceedings, and that the phrase "any proceeding arising under this chapter" as found in the body of the statute should therefore be interpreted as if it read "any proceeding before the Commission arising under this section."

Such an argument begins, of course, with the assumption that the phrase in question does not mean what it says. It assumes that the sub-title requires that new words be added to restrict the plain and literal meaning of the words employed in the body of the statute.

This Court has long since rejected such an approach. In *United States* v. *Fisher*, 2 Cranch 358, Chief Justice Marshall said (at 386):

> "Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction."

Plaintiffs argued that the word "proceeding" as used in this provision has too narrow a connotation to refer both to Commission proceedings and court proceedings. A complete answer to this contention can be found by looking no further than the heading of paragraph 12 in the preceding section of the same Act, the paragraph under which plaintiffs say in their complaint this suit was brought. It reads as follows:

> *"Proceedings to enforce orders other than for payment of money."* (49 USCA Sec. 16(12))

We think it is manifest that the plain meaning of Section 17(11) requires allowance of the Brotherhood's application for intervention of right, and that the construction adopted by the district court in denying intervention not only tortures the words of the statute, but in so doing arrives at the patently inconsistent and unreasonable conclusion that the representative of railroad employees should be allowed to intervene before an administrative agency in a proceeding affecting them, but not before a court in a proceeding wherein they are faced with an injunction.

B. *The Judicial Code Confers the Right of Intervention on the Brotherhood.*

The second statutory provision requiring allowance of the Brotherhood's application to intervene is found in the Judicial Code, Sec. 212, 213 (28 USCA Sec. 45a), the pertinent portion of which is as follows:

> "The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title * * * *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any

suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further,* That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; . . . ."

This section plainly requires allowance of intervention to an association "interested" in any suit governed by Section 44 "relating to action of the Interstate Commerce Commission." Section 44, as already pointed out, governs the procedure in district courts "in respect to cases for the enforcement . . . of any order of the Interstate Commerce Commission other than for the payment of money." Nothing could be clearer than that this provision applies to the instant suit, and confers the right of intervention on the Brotherhood if it can be identified as an "interested" association. We submit that the plaintiffs themselves furnished such identification by naming River Road employees as persons who should be enjoined. If this statute requires the showing of a greater interest than that the applicant association's members are to be enjoined in the suit from doing work awarded them under a collective bargaining agreement, then this statute is not one intended to allow intervention, but to deny it. Compare: *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113; *Kansas City Southern Ry. Co.* v. *U. S.*, 282 U. S. 760; *Boston Tow Boat Co* v. *U. S.*, 321 U. S. 632.

Even if this suit had not sought direct injunctive relief against employees, the Interstate Commerce Act identifies the Brotherhood as "interested," by virtue of its collective bargaining agreement, no matter what interpretation is put on the Commission order which plaintiffs say is in conflict with the Brotherhood's agreement. Section 5(2)(f) of the Act (49 USCA 5(2)(f)) provides, in part, as follows:

> "* * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The trial judge held that the provision for intervention in the Judicial Code was unavailing to the Brotherhood. The reasons for his holding were stated by him before the plaintiffs could advance their argument that the Brotherhood is not "interested" in the suit within the meaning of this statute (R. 144). Referring to Sections 44 and 45a (28 USCA), the judge said (R. 143-144):

> "The right of intervention, if there is any such thing as an absolute right of intervention, would have to come under the Commerce Act, and it does not come there. The matters you have referred to, in my judgment, refer to proceedings before the Commerce Commission where some order of the Commission tries to affect those rights of outside parties, such as a labor union or a city or a village or some other group of individuals. In my judgment it does not apply to cases in court."

Here we find a holding that Section 44, which by its terms governs "procedure in district courts" in cases for enforcement of Commission orders, and Section 45a, which by its terms provides for intervention in "any suit" relating to action of the Commission, should nevertheless be

construed so as to apply only to proceedings before the Commission, and not to cases in court. In short, this is a holding that the Judicial Code does not apply to the judiciary.

III. The Brotherhood Is Entitled to Intervention of Right Under Rules of Civil Procedure 24(a) (2).

Rule 24(a)(2) of the Rules of Civil Procedure is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ."

This provision for intervention of right clearly applies to the Brotherhood's application if River Road trainmen are or may be bound by the injunction sought, and the interest of the trainmen is or may be inadequately represented by the named defendants. The preliminary injunction already issued against the Brotherhood members, which plaintiffs are seeking to have made permanent, more than satisfies the requirement that the applicant is or may be bound by a judgment in the action.

We think it should be equally clear, from the very nature of the case, that the Brotherhood's interest in this suit is not adequately represented by the named defendants. The River Road, as employer of Brotherhood members, is the only party to be considered in this connection, and it has emphatically stated not only that it feels no duty to represent the Brotherhood, but that it recognizes that River Road interests may actually be adverse to the Brotherhood (R. 127). The obvious truth is that the River Road never had any appetite for the settlement agreement of January 23, 1946, and made that agreement with the Brotherhood

only in the face of an almost unanimous strike vote by Brotherhood members (R. 85). It would be surprising indeed if the River Road, as the reluctant party to a contract being attacked by others as unlawful, should zealously defend its unpleasant duty of performing it. The gravest danger to the River Road in the suit was not that its performance of the contract would be enjoined, but that the Brotherhood members might be excepted from the restraining effect of the injunction. This is the only logical inference to be drawn from the fact that it was the River Road, in the first instance, which invited the trial judge's attention to the absence of the Brotherhood as an indispensable party, and yet made no motion to dismiss for failure to join an indispensable party. Nevertheless, when the Brotherhood asked leave to file a special appearance for the purpose of moving to dismiss the proceeding on this same ground, the River Road strenuously objected. Mr. Murray, attorney for the River Road, insisted that the appearance of the Brotherhood be made generally or not at all (R. 75, 77). The district judge affirmed this stand taken by the River Road as follows (R. 79):

> "I will not have a special appearance around here or any *amicus curiae*. People coming in will come in with both feet, and get their feet wet."

As already suggested, the River Road offered no defense to the injunction on the ground that the suit involved or grew out of a labor dispute, and that the court therefore had no jurisdiction, under the Norris-LaGuardia Act (29 USCA Sec. 101-115), to issue the injunction. Plaintiffs' complaint does not even purport to make out a case for an injunction under this Act, and the application of its provisions to this suit would clearly require dismissal insofar as an injunction is sought.

It is unthinkable that an adequate representation of the Brotherhood's interest would not include at least a citing

of the Norris-LaGuardia Act and pertinent decisions thereunder in defense against the injunction. A case directly in point is *Lee Way Motor Freight, Inc.* v. *Keystone Freight Lines, Inc.*, 126 Fed. (2d) 931 (10th Cir. 1942), certiorari denied in 317 U. S. 645. That was a suit under the motor carrier provisions of the Interstate Commerce Act, brought by a motor carrier against other such carriers for an injunction to compel the defendant carriers to resume former traffic relationships with plaintiff. The plaintiff was having labor difficulties, and its property was being picketed. Defendant carriers, pursuant to bargaining agreements with their own employees, had refused to handle traffic for plaintiff under such conditions. The reasoning and conclusion of the Court of Appeals as to the applicability of the Norris-LaGuardia Act in this situation was as follows (at 933):

> "Disturbance of the relationship between defendants and their employees was threatened. A strike of such employees with the resulting injury to the businesses of defendants was in the immediate offing. It could be avoided only by settlement of the controversy between plaintiff and the unions, or by defendants terminating their traffic relations with plaintiff. The labor dispute originating between plaintiff and the unions thus projected itself into the relationship between defendants and their employees. Clearly the subject matter of plaintiff's action involved and grew out of a labor dispute, within the intent and meaning of the act. • • •
>
> "The Motor Carrier Act, *supra*, places upon a common carrier of freight in interstate commerce certain duties and responsibilities toward the public, and ordinarily such duties and responsibilities are paramount to private rights. But whatever other remedies may or may not be available, *there is nothing in the exactions of the Motor Carrier Act which operates to enlarge beyond the limitations of the Norris-LaGuardia Act the jurisdiction of a United States Court in re-*

spect to the issuance of a restraining order or a temporary or permanent injunction in a controversy involving or growing out of a labor dispute.

"The judgment is reversed and the cause remanded with direction to dismiss the action." (Emphasis added.)

This case squarely holds that the broad definition in the Norris-LaGuardia Act of a suit growing out of or involving a labor dispute includes a situation wherein the relationships between a defendant and its employees will necessarily be affected by the relief sought in the suit, even though there is no open breach in those relationships at the time the suit is instituted. Thus in our case, a labor dispute between the River Road and its employees is clearly involved when the plaintiffs seek use of the injunctive weapon to reopen a dispute which was barely settled when the suit began. Moreover, this suit obviously grew out of the labor dispute settlement of January 23, 1946.

We do not intend to suggest that the River Road merely overlooked the obviously strong defense against the injunction available to it under the Norris-LaGuardia Act and the *Lee Way* case, and was thereby inept in its representation of the employees' interest. It is a matter of record that the River Road's counsel considered both the act and the case, "but were not persuaded (*sic*) that they were applicable or decisive of any issues involved in this suit" (R. 129). The *Lee Way* case and other authorities decided under the Norris-LaGuardia Act establish that the limitation placed by the Act on the power of federal courts to issue injunctions in suits involving or growing out of labor disputes applies to suits for injunction brought under the Interstate Commerce Act or any other statute or rule providing for issuance of injunctions. Rules of Civil Procedure 65(e); *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad Co.*, 321 U. S. 50; *Southeastern Motor*

Lines, Inc. v. *Hoover Truck Co., Inc., et al.*, 34 F. Supp. 390 (D. C. Tenn., 1940).

In addition to the Norris-LaGuardia Act and authorities thereunder, another highly important decision also falls into the category of the cases which the River Road was not "persuaded" even to cite in defense of this action. It is *Gulf, Mobile & Northern Railroad Company* v. *Illinois Central Railroad Company*, 21 F. Supp. 282 (D. C., Tenn., 1937, appeal dismissed by stipulation in 109 F. (2d) 1016). In that case the court considered a factual situation much similar to the present one from the standpoint of the meaning and legal effect of an Interstate Commerce Commission order, and is worthy of consideration in some detail.

In the *Gulf* case plaintiff railroad filed an application with the Interstate Commerce Commission requesting its approval of a proposed agreement between the plaintiff and defendant railroads by which the plaintiff would acquire the right to operate its trains over the tracks of the defendant, such trains to be drawn by the plaintiff's own engines and in charge of the plaintiff's own employees. The report of the Commission made specific reference to the proposed agreement and to the fact that the plaintiff's trains were to be drawn by its own engines and in charge of its own employees. The order of the Commission, issued on May 20, 1933, expressly referred to and made the report of the Commission a part of the order. The order of the Commission directed a certificate of public convenience and necessity to be issued effective June 7, 1933, with respect to the trackage rights involved. The two railroads then executed the proposed agreement.

Thereafter representatives of the employees of the defendant railroad claimed that they were entitled to operate the trains of the plaintiff while exercising its trackage rights over the lines of the defendant for the reason that such employees had an agreement with the defendant rail-

road entitling them to man all trains operating over the defendant's tracks. The employees of the defendant threatened to strike unless such work were given to them. Thereupon the defendant notified the plaintiff that it would use the defendant's employees in the operation of the plaintiff's trains over the tracks of the defendant railroad. The plaintiff filed suit on the ground that the order of the Interstate Commerce Commission of May 20, 1933, with respect to the trackage rights involved, entitled the plaintiff to an injunction restraining the defendants from interference with the operation of its trains pursuant to the terms of the contract entered into in accordance with the order of the Interstate Commerce Commission.

After reviewing the above facts, the court, in an exhaustively annotated opinion, decided that plaintiff was not entitled to an injunction requiring that it be permitted to use defendant's tracks with plaintiff's own crews. The court particularly noted that the Commission report had mentioned use of plaintiff's own crews while operating on defendant's tracks. Portions of the opinion follow (beginning at 289):

> "It is, therefore, necessary to consider and weigh the authorities to determine whether under all circumstances it must be implied that, because the Interstate Commerce Commission issued a certificate of public convenience and necessity to one railroad to operate its trains over the tracks of another, pursuant to a contract which provided that it would use its own train crews, the licensee railroad received, without express mandate from the Commission, an order, enforceable in a United States court by the extraordinary processes of injunction and specific performance, to use its own employees regardless of intervening public interest in the avoidance of a strike.
>
> "(2) The Supreme Court has distinctly held that the lack of express finding by the Interstate Commerce Commission may not be supplied by implication. *Atchi-*

son, Topeka & Santa Fe R. R. Co. v. *United States*, 295 U. S. 193, 55 S. Ct. 748, 79 L. Ed. 1382, decided April 29, 1935. * * *

"It is believed, from study of the cases, that unwarranted implication would be required to find that the order of the Interstate Commerce Commission here involved embraced an unchallengeable conclusion that the public convenience and necessity demanded the operation of plaintiff's trains over defendant's tracks by the former's employees.

"(3) Even if the Interstate Commerce Commission intended by its order to determine finally the right of the plaintiff to use its own employees in operating trains over defendant's tracks, would the Commission have jurisdiction and power to do so? The conclusion has been reached that it would not.

"Nowhere in the statutes of the United States is the Interstate Commerce Commission given jurisdiction over labor controversies. The Railway Labor Act provides the means for governmental mediation of disputes growing out of the working conditions of railroad employees, but the statute does not compel arbitrament. Act May 20, 1926, c. 347, Sec. 2, 44 Stat. 577, as amended by Act June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186 (45 U. S. C. A. Sec. 151a). How, then, can any implication be drawn from the provisions of the Interstate Commerce Act that the issuance of an order beyond the jurisdiction of the Commission can attain such sanctity as to become enforceable by mandatory processes of United States courts, with the resultant effect that vital interests of organized labor become foreclosed thereby unless redeemed by the successful outcome of unwilling arbitration or by the economic force of a strike? * * *

"(4) From insistence that the Interstate Commerce Act places a mandatory duty upon the courts to enforce obedience to the orders of the Commission, counsel for plaintiff deduce that this court is compelled to grant the mandatory injunction prayed and to decree specific performance of the contract in all of its terms.

"*Central New England Ry. Co.* v. *Boston & Albany R. R. Co.*, 279 U. S. 415, 49 S. Ct. 358, 73 L. Ed. 770, answers the argument of the plaintiff. The case involved the effect of an order of the Interstate Commerce Commission which it was contended relieved a carrier of its obligation to make further payment under a trackage agreement. In holding to the contrary, the Supreme Court pointed out that the certificate of the Commission certified only that public convenience and necessity permitted the abandonment of the trackage and that the petitioner was authorized to abandon it; and that the respondent 'whose rights were vitally affected by the order' was not notified of the proceeding before the Commission, nor a party to it. The court said (279 U. S. 415, 419, 421, 49 S. Ct. 358, 359, 73 L. Ed. 770): 'Even if the broad purposes ascribed to the Act be assumed, it is not to be supposed that the Commission intended to do more than was stated in its order. * * * Respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annulling the contract. The question is merely one of the legal effect of the order.'

"In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023, it was held that an order of the Interstate Commerce Commission disapproving reduced rates proposed by a carrier is void, unless supported by findings of the basis or quasi jurisdictional facts conditioning the power of the Commission. With reference to the report of the Commission, Mr. Justice Cardozo said (294 U. S. 499, 510, 511, 55 S. Ct. 462, 467, 79 L. Ed. 1023): 'The difficulty is that it (the Commission) has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting

inferences. Something more precise is requisite in the quasi jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221; *Florida* v. *United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

"See, also, *Interstate Commerce Commission* v. *Illinois Cent. R. R. Co.*, 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280.

"Upon the principles of the three last-cited cases and of other authorities discussed earlier in this opinion, it is manifest that no duty has been imposed upon this court to adjudge contrary to its own interpretation of the scope, meaning, and effect of an order of the Interstate Commerce Commission. * * *"

One of the basic principles followed in the *Gulf* case, *i.e.*, that Interstate Commerce Commission orders should not be construed so as to nullify the right of railroad employees to better their position through collective bargaining, was the subject of an amendment added in 1940 to the Interstate Commerce Act (49 U. S. C. A. Sec. (5) (2) (f)), quoted *supra*, by which it was provided that "notwithstanding any other provisions" of the Act, an agreement pertaining to the protection of employees may be "hereafter" made by the railroad with the representative of its employees. We think the *Gulf* case ought to have been cited as part of an adequate defense of the employees' interest.

Proper application of the above stated principle to our case clearly necessitates careful inquiry into the exact provisions of the Commission order of 1922, the report on which it is based, and the actual "traffic and operating relationships" then existing between the River Road and

other carriers with respect to the disputed freight movements. Such an inquiry would have disclosed that numerous matters were not specifically covered by the Commission order and report of 1922, such as whether foreign crews had theretofore been handling switching and spotting of all stock cars incident to outbound movements on River Road tracks. It would also disclose whether a distinction was intended to be made in the handling of cattle movements, as compared with those involving hogs and sheep. And most important of all, the inquiry would show what employer-employee relationships, contractual or otherwise, had existed with reference to these matters between the carriers involved and their employees, and especially between the River Road and its employees. This subject would necessarily include all factors bearing on the question whether the Commission, in passing on an application for approval of the purchase of stock and the making of a lease, intended to cut off all collective bargaining rights of employees of the carriers involved. The matter of notice to such employees might well be investigated to throw light on this question. Without complete information on at least these subjects, the court was obviously in no position even to determine whether there was any real conflict to be reconciled between the Commission order and the Brotherhood's employment contract, much less whether the performance of the employment contract constituted a violation of the order which should be enjoined.

Under the defense offered by the River Road, no answer was filed denying plaintiffs' charge that performance of the settlement agreement constituted a violation of the Commission order until more than two months after the preliminary injunction was issued. The record convincingly indicates that the court started off, so far as the Brother-

hood was concerned, by assuming that violation of the Commission order was a proved fact, and that anything said to the contrary amounted to a wholly unwarranted attack on the order itself and could not even be considered (R. 76). We acknowledge that if this theory were correct, any defense at all would be more than adequate—it would be an extravagance.

We note that the trial judge, as late as the time he was allowing this appeal, did not believe that the point of inadequacy of representation was involved in an application for intervention of right under Rule 24(a)(2) of the Rules of Civil Procedure. The view of the trial judge was expressed as follows (R. 155):

> "If it were a matter of discretion I would have denied it because there was no showing the parties seeking to intervene were not properly represented by other parties of record, but I passed on it as a question of right."

Conclusion.

The application of the Brotherhood to intervene, as a matter of right, should have been granted on each of these grounds:

The Brotherhood is an indispensable party;

Federal statutes confer upon the Brotherhood an unconditional right to intervene;

The employees represented by the Brotherhood are or may be bound by a judgment in the action, and the representation of their interest by existing parties is or may be inadequate.

Intervention of right is required on any one or more of the above grounds, all of which should have been sustained,

and the motion to intervene should have been allowed. The order denying intervention should be reversed.

Respectfully submitted,

BURKE WILLIAMSON,
JACK A. WILLIAMSON,
Attorneys for Appellant,
39 South La Salle Street,
Chicago 3, Illinois.

ADAMS NELSON & WILLIAMSON,
Of Counsel,
39 South La Salle Street,
Chicago 3, Illinois.

March 31, 1947.